In the Supreme Court

OF THE

United States

OCTOBER TERM, 1948

No. 564

TUCKER PRODUCTS CORPORATION,
Petitioner,

vs.

GEORGE S. HELMS, HAROLD T. THRASH, GEORGE S. HELMS and HAROLD T. THRASH, as co-partners, doing business under the firm name and style of George S. Helms and Harold T. Thrash,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

HERBERT RESNER,
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to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Tucker Products Corporation, respectfully alleges:

A

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a complaint for damages for breach of contract filed by your petitioner as plaintiff against the respondents as defendants in the District Court of the United States for the Northern District of California, Southern Division, wherein it is alleged that the matter in controversy exceeded $3,000 and that your petitioner is a corporation organized and existing under the laws of the State of Massachusetts and having its principal place of business at Fitchburg in said State, and that the respondents are citizens of the State of California, residing in the City and County of San Francisco in said State, and doing business in said City and County. (TR 2-3.)[1]

The complaint for damages (TR 2-6) alleges that on November 8, 1947, petitioner and respondents entered into a contract for sale whereby respondents agreed to sell and deliver to petitioner certain lumber therein described. It is alleged that this contract of sale was confirmed by a written memorandum which is set out *in haec verba* in the complaint. (TR 4.) The said written memorandum contained a proviso that its acceptance was subject to the establishment of credit. The complaint alleges that petitioner established credit at the Bank of California and sets forth *in haec verba* the document which established said credit. (TR 5.) The complaint then recites that ever since the establishment of said credit, petitioner

[1]References to the transcript of record will hereinafter be cited as "TR".

has been ready, willing and able to pay for the said merchandise but that respondents have refused to deliver, and have not delivered, the same, and that by reason thereof petitioner suffered damages in the sum of $50,000.

To this complaint the respondents interposed answers which denied the material charging allegations of the complaint. (TR 6-10.) After the filing of the answers the respondents filed a supplemental answer and special defense in which the respondents asserted that petitioner represented that it would deposit at Covelo, California, an irrevocable letter of credit in the sum of $80,000, and that petitioner failed to establish said letter of credit, whereby respondents were prevented from performing their part of the contract. (TR 11-17.)

The matter was tried before the District Court on April 29 and 30, 1948. Evidence was introduced and witnesses testified. Thereafter, on July 2, 1948, the District Court entered an order for judgment wherein it recited that petitioner had failed to perform conditions which were precedent to exaction of performance by respondents, and directed a judgment for respondents upon findings to be presented. (TR 18.) Findings of Fact and Conclusions of Law were presented by respondents on July 12, 1948. They were modified in various particulars by the Court, and as modified, signed by the Court on August 3, 1948. A judgment for the respondents was filed on August 3 and entered on August 4, 1948. (TR 18-22.)

On August 12, 1948, petitioner served and filed a notice of appeal to the Circuit Court of Appeals for the Ninth Circuit from the aforesaid judgment. On August 24, 1948, petitioner served and filed its designation of record on appeal. This designation included the entire record below. (TR 22-24.) No counter-designation was served or filed by respondents.

Thereafter the District Court, not at the request of petitioner but apparently at the request of its own clerk (TR 29, 50), made orders extending the time within which to file the record on appeal, the last of which ran to and including November 10, 1948. (TR 24-25.)

During this period of time counsel for petitioner was engaged in a series of cases and a course of litigation which is described in his affidavits filed with the Court of Appeals (TR 29-30, 43-52), and which will be considered in more detail in the brief filed herewith.

The record on appeal was tendered to the clerk of the Court of Appeals on November 26 and again on December 1, 1948 (TR 29-30, 50-53), sixteen days and twenty days respectively after the time of the last extension. The clerk refused to accept the tender and informed petitioner that it would be necessary to file a motion with the Court for an extension of time within which to docket the record. (TR 53.) Such a motion was filed on December 3, 1948 (TR 27-31), and was heard by the Court on December 13, 1948. (TR 31-32.) The Court, on December 14, 1948, the day after the submission of the motion, de-

nied the motion, and also granted a purported oral motion to dismiss the appeal. (TR 31-35.) This last motion was not properly before the Court according to its own Rule 17 which requires all motions to be in writing and served with points and authorities on the adverse party in advance of the hearing. A petition for rehearing was filed on December 31, 1948 (TR 37-53), and was, without argument or any further proceedings, denied by the Court on January 3, 1949. (TR 55.) On January 10, 1949, petitioner designated the entire record save and except the transcript of the oral testimony taken at the trial of April 29 and 30, 1948, as the record to be used on this petition for certiorari. (TR 55-56.)

B

JURISDICTION.

1. Petitioner's action was brought under the provisions of 28 U.S.C.A. 41(1) (old), Title 28 U.S.C. 1332 (new) since the matter in controversy exceeded $3,000, and the cause was between citizens of different states.

2. The jurisdiction of the Court of Appeals to entertain the appeal of petitioner was based upon § 128 of the Judicial Code (28 U.S.C.A. 225) (old), Title 28 U.S.C. 1291 (new).

3. The jurisdiction of this Honorable Court is based upon § 240(A) of the Judicial Code as amended by the Act of February 13, 1925. (28 U.S.C.A. 347) (old), Title 28 U.S.C. 1254 (new.)

C.

QUESTIONS PRESENTED AND REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT OF CERTIORARI.

1. The Court of Appeals, by its decision in granting the purported motion to dismiss the appeal, committed the following errors:

(a) It granted a motion which was not properly before it. The provisions of its own Rule 17 require that all motions must be in writing and served on the adverse party with points and authorities in advance of the hearing. This was not done with respect to the oral motion to dismiss which the Court granted.

(b) It departed from the accepted and usual course of judicial proceedings by applying Rule 73(g) of the Federal Rules of Civil Procedure in a way which, if allowed to stand, would stultify the processes of justice and completely and effectively denied to petitioner his day in Court. In this connection it is clear that there was no prejudice to the respondents or any interference with the functioning of the Court's duties by the relatively short delay which occurred between the date of the expiration of the time provided for in the last extension granted by the District Court and the dates of the tender of the record on appeal to the clerk of the Court of Appeals. It is also clear that the reasons set forth in the affidavits of petitioner's counsel were sufficiently cogent to justify the Court's denial of the purported motion to dismiss the appeal and to warrant the Court's refusing to exercise such a dras-

tic remedy in the case. The effect of the Court of Appeals' opinion in dismissing the appeal is to refuse to pass upon the merits of the case and therefore to deprive petitioner of his day in Court.

2. The Court of Appeals, by denying petitioner's motion for an extension of time within which to docket the record on appeal, committed the following error:

(a) It departed from the accepted and usual course of judicial proceedings by applying Rule 73(g) of the Federal Rules of Civil Procedure in a way which, if allowed to stand, would stultify the processes of justice and completely and effectively denied petitioner his day in Court. The motion was addressed to the said discretion of the Court. However, its discretion under the law was to be exercised in the light of all of the facts and circumstances of the case, and was not to be exercised, except for the most compelling and cogent reasons, in a manner which would deprive petitioner of a hearing of its appeal on the merits. No such reasons were present. On the contrary, the reasons which were advanced were of such a nature as to require the Court in the exercise of its discretion to grant petitioner's motion and to permit the record to be docketed and the appeal disposed of on its merits.

3. The Court of Appeals' reliance upon the case of *Maghan v. Young,* 154 Fed. (2d) 13 (App. D.C.), was erroneous for the following reasons:

(a) In the *Maghan* case the *appellee* moved to docket the record and dismiss the appeal after the time for filing the appeal had run. The Court held that *under those circumstances,* it would dismiss the appeal. In this case, it was petitioner, *the appellant*, who, *immediately upon being apprised of the fact that the time had expired, itself moved promptly, expeditiously and without delay to have the record docketed* for the purpose of having the appeal heard on the merits. There was nothing in the record before the Court of Appeals which could justify a conclusion that petitioner was guilty of dilatory tactics or laches. Immediately the oversight was called to petitioner's attention, it took prompt and expeditious steps to correct it. Respondents, appellees below, never made a move to have the appeal dismissed. (See above, Point 1a.) Under such circumstances, reliance on *Maghan v. Young* was in error.

4. The Court of Appeals erred in not considering the substantiality of the question presented on appeal:

Although the question of substantiality on appeal has not been held a necessarily determinative factor, it has been considered by many appellate courts in determining the exercise of their discretion under this and similar circumstances. The Court below did not take this matter into consideration at all (insofar as appears from its opinion and order), and despite the fact that the record does present a substantial question of law

as to whether or not the letter of credit provided by petitioner (TR 5) was a compliance with the condition required in the written contract (TR 4), the Court below, by a harsh application of the Rule (an application which in its discretion it need not have made), deprived petitioner of his right to have that question determined on the merits.

5. The Court of Appeals' dismissal of the appeal was an abuse of discretion and involved an application and construction of the Federal Rules of Civil Procedure in a manner in conflict with the decided opinions of this Court and of the Courts of Appeals of other Circuits.

In this connection this Court and the Courts of Appeals of other Circuits have expressed the view that while the Rules are of course to be followed, they are not to be applied with such harshness and strictness as to deprive a litigant of a hearing of his appeal on the merits unless no other course is open. Where a relaxation of the strict application of the Rule will result in no prejudice to the adverse party or interfere substantially with the operations of the Court, and where the requirement is not jurisdictional, this Court and Courts of Appeals in other Circuits have generally afforded the relief sought. The failure of the Court of Appeals for the Ninth Circuit to afford the relief sought in this case is contrary to the views of this Court and of Appellate Courts in other Circuits, and results in

the deprivation to petitioner of his right to have his appeal decided on the merits.

For all of the foregoing reasons, this Honorable Court should grant certiorari.

Wherefore, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court a complete transcript of records and all proceedings had in said Court of Appeals for the Ninth Circuit in the case therein entitled, "Tucker Products Corporation, Plaintiff and Appellant, v. George S. Helms, etc., et al., Defendants and Appellees", No. 12,125, that said case may be reviewed and determined by this Court and the decision therein finally revised and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem appropriate.

Dated, San Francisco, California,
February 9, 1949.

HERBERT RESNER,
Counsel for Petitioner.

GLAISTEIN, ANDERSEN, RESNER & SAWYER,
Of Counsel.

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Court of Appeals in and for the Ninth Circuit is reported at 171 Fed. (2d) 126, and appears in the Transcript of Record at pages 33-34.

II.

JURISDICTION.

1. Petitioner's action was brought under the diversity of citizenship statute of the Federal Code (28 U.S.C.A. 41[1] [old]), Title 28 U.S.C. 1332 (new).

2. The jurisdiction of the Court of Appeals to entertain the appeal of petitioner was based upon § 128 of the Judicial Code (28 U.S.C.A. 225 [old]), Title 28 U.S.C. 1291 (new).

3. The jurisdiction of this Honorable Court is based upon § 240(A) of the Judicial Code as amended by the Act of February 13, 1925 (28 U.S.C.A. 347 [old]), Title 28 U.S.C. 1254 (new).

4. The date upon which the Court of Appeals' opinion was filed was December 14, 1948.

5. The date upon which the Circuit Court of Appeals' order denying petition for rehearing was filed was January 3, 1949.

6. The mandate of the Court of Appeals has been stayed by order of the chief judge of said Court provided that a petition for writ of certiorari be filed with this Honorable Court on or before February 15, 1949.

III.

ABSTRACT OF THE CASE.

Since the only questions we are presenting in the petition for writ of certiorari have to do with the

action of the Court of Appeals in granting a purported motion to dismiss the appeal and in denying the motion for an extension of time within which to docket the record on appeal, and since the Court of Appeals itself did not pass upon the merits of the appeal, we shall not here review the evidence or the law with respect to the merits of the appeal but shall confine ourselves solely to facts and the law with respect to the question of the legality of the Court of Appeals' orders dismissing the appeal and refusing to permit it to be docketed. We recognize that the proper place for the appeal to be heard on its merits is in the Court of Appeals and the only relief we here seek is that this Court direct the Court of Appeals to hear the appeal on its merits.

Limiting ourselves, then, to the considerations above stated, the record shows that the judgment appealed from was filed on August 4, 1948. (TR 22.) It further shows that within seven days thereafter petitioner prepared a notice of appeal, a copy of which was served and filed on the eighth day after the entry of judgment. This certainly does not look as though petitioner were guilty of laches. By Rule 73(a) of the Federal Rules of Civil Procedure, petitioner had thirty days within which to file its notice af appeal. Yet it filed that notice within eight days. The designation of record on appeal was filed on August 23, 1948. (TR 23-24.) Although the rules fix no time within which such a designation must be filed, we submit that filing it within fifteen days of the time of the filing of notice of appeal is a further indication

of the absence of laches on the part of petitioner. Particularly is this so since the designation embraced the entire record and consequently there was no need for respondents to file a counter-designation and one was not filed. Certainly there was no prejudice to respondents up to this point, and up to this point the record is totally devoid of any evidence of laches or dilatoriness on the part of petitioner.

Thereafter began a series of events which resulted in the matter now being before this Court. The affidavits filed by counsel for petitioner recite what transpired. (TR 29-30, 43-52.)

In August of 1948, and for a long time prior thereto, it was apparent that unless the maritime unions and the employer associations on the Pacific Coast could come to an understanding with respect to wages, hours and working conditions, particularly with respect to the impact of the so-called "anti-closed shop" provisions of the Labor Management Relations Act of 1947 (29 U.S.C.A. 141 et seq.), there was going to be a most serious work stoppage on that coast, a stoppage which would affect not only the forty or fifty thousand maritime workers employed on that coast and the hundreds of shipping companies engaged in the business of water-borne transportation on that coast, but also a substantial portion of the entire economy of that section of the nation. Petitioner's counsel was counsel for all of the major unions involved in that controversy. Due to the importance and significance of the controversy as well as to the novelty and complexity of the problems, both

of a legal and economic nature presented by the controversy, petitioner's counsel found his time, beginning with the latter part of August, 1948, and running on through until late in November, 1948, completely taken up. A detailed statement of the activities in which counsel was engaged, including almost continuous appearances, before Federal District Courts, Trial Examiners of the National Labor Relations Board, and a congressional committee, both in San Francisco and in New Orleans, appears in the affidavits submitted to the Court of Appeals hereinabove referred to. As well as attending these various hearings, counsel was engaged in consulting with and advising the officers and committees of the various unions involved with respect to their negotiations in the latter part of August, 1948, and again in the latter part of November, 1948, when the controversies between the unions and the employers were resolved and the men returned to work.

Under these circumstances, counsel inadvertently overlooked the running of time on the docketing of the record on appeal in this case.

Such an inadvertence, we submit, is completely understandable in view of the nature of the events which occupied counsel's attention during the period in question, and is furthermore understandable in view of the fact that the experience of counsel with respect to appeals to the Court of Appeals led him to believe that the preparation of the record on appeal and the docketing of same would be taken care

of by the clerk of the District Court as a merely routine matter. (TR 50.)

Petitioner's counsel have, over the years, had many cases in the Court of Appeals and in this Court.

De Zon v. American President Lines, 318 U. S. 660, 63 S. Ct. 814, 87 L. Ed. 1065 (129 F. (2d) 404);

Schneiderman v. U. S., 320 U. S. 118, 63 S. Ct. 1333, 87 L. Ed. 1796 (119 F. (2d) 500);

Bridges v. Wixon, 326 U. S. 135, 65 S. Ct. 1443, 89 L. Ed. 2103 (144 F. (2d) 927);

Aragon v. Unemployment Commission, 329 U. S. 143, 67 S. Ct. 245, 91 L. Ed. 136 (149 F. (2d) 447);

Hoiness v. U. S., ... U. S. ....., 69 S. Ct. 70, 93 L. Ed. 7 (165 F. (2d) 504).

This is the first case in which a District Court clerk has not transmitted a transcript on appeal to the clerk of the Court of Appeals on the ground that the modest fee ($11.50 in this case) had not been paid. Either the District Court clerk has billed counsel in sufficient time to permit payment before the expiration of the time allowed or he has transmitted the record and then sent the bill. No clerk has ever questioned the credit of counsel in such a matter. (TR 50.) In this very case, for example, the clerk of the Court of Appeals printed the transcript to be used on this application for certiorari and delivered it to counsel on January 19, 1949 and counsel received the bill for it on February 5, 1949.

Furthermore, immediately after the fact of the default was called to counsel's attention, steps were taken without any delay whatsoever to docket the record with the Court of Appeals. The clerk of the Court refused to accept the record save upon order of the Court, and consequently a motion to extend the time within which to docket the record was promptly made, but was denied. At the time of its denial of petitioner's motion, the Court of Appeals also granted a purported motion to dismiss the appeal.

IV.

ASSIGNMENT OF ERRORS.

1. The Court of Appeals erred as a matter of law by abusing its discretion in refusing to extend the time within which the appeal might be docketed.

2. The Court of Appeals erred as a matter of law by ruling on a purported motion to dismiss the appeal in violation of its own Rule 17.

3. The Court of Appeals erred as a matter of law by abusing its discretion by granting a purported motion to dismiss the appeal.

4. The order denying the motion to extend time to docket the record is contrary to the law.

5. The order granting the purported motion to dismiss the appeal is contrary to the law.

V.

ARGUMENT.

1. THE COURT OF APPEALS HAD JURISDICTION TO ENTERTAIN THE APPEAL.

There is no argument but what the timely filing of the notice of appeal gave the Court of Appeals jurisdiction over the appeal and that the mere failure to take further steps to secure the review of the judgment appealed from, did not affect the validity of the appeal.

Federal Rules of Civil Procedure, Rule 73(a);
Pyramid Motor Freight Corp. v. Ispass, 330 U. S. 695, 67 S. Ct. 954, 91 L. Ed. 1184;
Ainsworth v. Gill Glass & Furniture Co., 104 Fed. (2d) 83 (C.C.A. 3);
Mutual Benefit Health & Accident Ass'n v. Snyder, 109 Fed. (2d) 469 (C.C.A. 6);
Burke v. Canfield, 111 Fed. (2d) 526 (App. D.C.).

It has been held by this Court that it is no abuse of discretion for a Court of Appeals to grant relief from failure to docket the appeal in time.

Pyramid Motor Freight Corp. v. Ispass, supra;
cf. *Hill v. Hawes,* 320 U. S. 520, 64 S. Ct. 34, 88 L. Ed. 283.

In this connection it should be noted that research has failed to uncover a single case in which this Court has held that a Court of Appeals abused its discretion by granting the relief sought. On the other hand, this Court has held that a failure to grant the relief sought

under some circumstances constituted an abuse of discretion.

cf. *Kelly v. U. S.*, 300 U. S. 50, 57 S. Ct. 335, 81 L. Ed. 507;

Reconstruction Finance Corp. v. Prudence S. A. Group, 311 U. S. 579, 61 S. Ct. 331, 82 L. Ed. 364.

In one case this Court has affirmed a denial to permit a revivor, but its action was predicated upon the mandatory language of Rule 25(a).

Anderson v. Yungkau, 329 U.S. 482, 67 S. Ct. 428, 91 L. Ed. 436.

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2. IT WAS AN ABUSE OF DISCRETION FOR THE COURT OF APPEALS TO REFUSE TO ENTERTAIN THE APPEAL.

The orders of the Court of Appeals here complained of were, it is submitted, the harsh exaction of what has been called the most "extreme penalty" which could be invoked in this situation (*Yager v. Liberty Royalties Corp.,* 123 Fed. (2d) 44 (C.C.A. 10)). The governing Rules of Civil Procedure were concededly established for the purpose of providing prompt and expeditious handling of appellate litigation. On the other hand, it has been held almost universally that the rules are to be liberally construed and applied with a view to disposing of litigation on its merits rather than to depriving litigants of their rights on technical or procedural grounds.

In *Kelly v. U. S.*, 300 U. S. 50, 57 S. Ct. 335, 81 L. Ed. 507, this Court reversed a judgment of the

Court of Appeals for the Ninth Circuit which had dismissed an appeal on its own motion on the ground that the record on appeal was not properly authenticated as required by Equity Rules 75(b) and 77. Mr. Justice McReynolds, speaking for this Court, said:

> "Manifestly the Equity Rules should be enforced with the strictness necessary to effectuate their essential purpose; orderly procedure so demands. But when, as here, there is mere omission of some step which has escaped the attention of both parties, and *when rigorous enforcement without fair opportunity to correct the error would defeat hearing on the merits and entail unnecessary hardship, we think appropriate relief promptly asked for should be afforded.* Permission to supply authentication of the record *would have occasioned no material injury to any party, nor interfered seriously with the business of the court.* In the circumstances we must regard the denial of an opportunity to amend as an abuse of discretion—*a violation of the spirit if not the letter of the Rules.*" (Emphasis supplied.)

This Court reversed an order of the Court of Appeals for the Second Circuit which had dismissed certain appeals in bankruptcy cases on the ground that the appellants (petitioners before this Court) had not sought an allowance of their appeals within the time prescribed by Section 25(a) of the Bankruptcy Act (*Reconstruction Finance Corp. v. Prudence S. A. Group,* 311 U. S. 579, 61 S. Ct. 331, 85 L. Ed. 364). In holding that the Court of Appeals had the power to allow the appeals, this Court said:

"The procedure followed by petitioners was irregular. Normally the Circuit Court of Appeals would be wholly justified in treating the mere filing of a notice of appeal in the District Court as insufficient. But the defect is not jurisdictional in the sense that it deprives the court of the power to allow the appeal. The court has discretion, where the scope of review is not affected, to disregard such an irregularity in the interests of substantial justice. * * * *In this case the effect of the procedural irregularity was not substantial. The scope of review was not altered. There was no question of the good faith of petitioners, of dilatory tactics, or of frivolous appeals. Hence it would be extremely harsh to hold that petitioners were deprived of their right to have the court exercise its discretion on the allowance of their appeals.* * * *" (Emphasis supplied.)

In *Burke v. Canfield,* 111 Fed. (2d) 525 (App. D.C.), the Court of Appeals for the District of Columbia, in saving an appeal which was not prosecuted according to the rules, stated that while it would exercise its discretion so to do most sparingly, it recognized that the rules were

"* * * intended to liberalize procedure in that regard [e.g., in regard to extensions of time to file records on appeal], and to avoid the harshness of the old Rules, which often required us to decline consideration of the merits because of counsel's neglect to comply with the Rules."

The same Court said, in *Hall v. Gordon,* 119 Fed. (2d) 463 (App. D.C.):

> "In our view the Federal Rules of Civil Procedure governing the preparation of the record on appeal *should be liberally construed so as to promote justice and relief against hardship. The letter of the Rule should be followed except where undue hardship would result. In such cases the Rule should be flexible rather than rigid. To apply the letter of Rule 75(C) in this case would of course defeat the appeal, and in our view this should not be permitted to happen if, without undue hardship to either party, it can be avoided."* (Emphasis supplied.)

These and other Courts have recognized that the purpose of the Rule was not to set up a rigid formalism within which conformity for the sake of conformity was to be insisted upon at the pain of a denial of a hearing on the merits, but rather that the purpose of the Rules was to guard against dilatory tactics on the part of litigants.

Miller v. U. S., 117 Fed. (2d) 256 (CCA 7) cert. den. 313 U.S. 591, 61 S. Ct. 1114, 85 L. Ed. 1545.

See also:

Crump v. Hill, 104 Fed. (2d) 36 (CCA 5);

Compania De Navegacion Transmar, S. A. v. Georgia Hardwood Lumber Co., 141 Fed. (2d) 652 (CCA 5);

Glenn v. American Surety Co., 160 Fed. (2d) 977 (CCA 6);

Schram v. O'Conner, 2 F.R.D. 192 (D.C. Mich.);

Weller v. Hayes Truck Lines, 355 Mo. 695, 197 S. W. (2d) 661.

Based upon this approach to the Rules, Appellate Courts have held that the "inadvertence" of counsel (*Buckley v. U. S.*, 33 Fed. [2d] 713 [CCA 6]), the engagement of counsel in other litigation or his inability to attend at a time fixed by the Court (*Mutual Benefit Health & Accident Ass'n v. Snyder,* 109 Fed. [2d] 469 [CCA 6]; *Tendler v. Massey,* 34 A. [2d] 33 [Mun. Ct. of App., D.C.]), and counsel's misconception of the law (*Ainsworth v. Gill Glass and Furniture Co.,* 104 Fed. [2d] 83 [CCA 4]), or his erroneous reliance on the permanency of a Circuit Court decision (*Reconstruction Finance Corp. v. Prudence S. A. Group,* 311 U.S. 579, 61 S. Ct. 331, 85 L. Ed. 364) justify granting relief from a failure to comply technically with the Rules.

Although *Moran v. Peck,* 294 Fed. 80 (CCA 6), was decided before the adoption of the Rules (and at a time when the general conception was that procedural requirements were to be more strictly complied with than is now the case), the Court there held that reliance by counsel on practices of the District Court Clerk in connection with the prosecution of the appeal was sufficient to justify an extension of time beyond that provided for in the Rules.

Similarly, in the case of *Shea v. U. S.*, 224 Fed. 426 (CCA 6), decided at a period prior to the adoption of the Rules, it was held that the failure of counsel to procure an extension of time due to an "oversight" did not require a dismissal of the appeal but rather called for an extension of time within which to docket the record.

This approach to the Rules is almost invariably applied in those cases where, as here, there is no showing of dilatoriness or laches by the appellant, and where, as here, there is no prejudice to the appellee by reason of the delay which has occurred.

Kelly v. U. S., 300 U.S. 50, 57 S. Ct. 335, 81 L. Ed. 507;

Despiau v. U. S. Casualty Co., 87 Fed. (2d) 270 (CCA 1);

Brennan v. United Fruit Co., 108 Fed. (2d) 710 (CCA 5);

Adams v. N. Y. etc. Ry. Co., 121 Fed. (2d) 808 (CCA 7);

Johnson v. Wilson, 118 Fed. (2d) 557 (CCA 9).

Similarly the Courts have been inclined to grant relief where, as here, there has been no serious interference with the business of the Court by the delay which has occurred. (*Kelly v. U. S., supra; Despiau v. U. S. Casualty Co., supra.*)

Another consideration which has motivated a beneficent exercise of the Court's discretion is the fact, here present, that the record presents a substantial controversy. (*Pence v. U. S.*, 121 Fed. [2d] 804 [CCA 7]; *Johnson v. Wilson*, 118 Fed. [2d] 557 [CCA 9]).

It is not possible from a reading of the reported decisions to ascertain the exact nature of the justification offered by appellants for the failure to comply literally with the rules and for the invoking of the Court's discretion in these cases, but as near as can be determined, in none of them was the justification

any stronger than that which was here presented to the Court of Appeals. Furthermore, it is not possible in all cases by an examination of the reported decisions to determine just how long a period of delay was involved. However, in those cases where it has been possible to ascertain the facts, it appears clear that the sixteen to twenty day delay which this case presents was equaled or exceeded on frequent occasions and yet relief was granted.

See:

Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695, 67 S. Ct. 954, 91 L. Ed. 1184 (19 days);

Brennan v. United Fruit Co., 108 Fed. (2d) 710 (CCA 5) (26 days);

Wilson v. Southern Ry. Co., 147 Fed. (2d) 165 (CCA 5) (upwards of two months).

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3. THE COURT OF APPEALS ERRED IN GRANTING THE PURPORTED MOTION TO DISMISS THE APPEAL.

Rule 17 of the Rules of the Court of Appeals for the Ninth Circuit reads as follows:

> "17. *Motion.*—1. All motions to the court shall be reduced to writing, shall contain a brief statement of the facts and objects of the motion, shall be supported by points and authorities, and, where the facts are not otherwise proved in the cause, by affidavits, and shall be served upon opposing counsel at least 5 days before the day noticed for the hearing.

"2. One-half hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

"3. No motion to dismiss, except on special assignment by the court shall be heard, unless previous notice as above has been given to the adverse party, or the counsel or attorney of such party.

"4. The motion and supporting papers unless printed shall be filed in typewritten form upon letter-sized paper, 8 inches by 10½ inches, bound on the left margin. If in typewritten form an original and three identical legible copies must be transmitted to this court."

It is clear from the record that no written motion containing a brief or any statement of facts and objects of the motion, supported by points and authorities or affidavits, was served upon opposing counsel at least five days, or any time, before any day noticed for hearing. Petitioner's designation of record to be used on this petition specifically requested the Clerk of the Court of Appeals to include in the transcript "any motions to dismiss that may have been made by defendants and appellees". (TR 56.) This designation was served upon respondents (TR 56), and no counter-designation has been served upon petitioner. In the transcript certified by the Clerk of the Court of Appeals as being a full, true and correct copy of the entire record designated, the only reference to a motion to dismiss the appeal appears in the opinion and judgment of the Court (TR 33-35) and in an

excerpt from the proceedings of Monday, December 13, 1948. (TR 31.) The latter states that the "oral motion of appellees to dismiss the appeal" was submitted to the Court. As Rule 17 provides that all motions must be reduced to writing, there was no motion to dismiss before the Court on December 13. It is particularly significant to note that Subsection 3 of Rule 17 emphasizes that no motion to dismiss shall be heard by the Court unless previous notice has been given to the adverse party. The record is devoid of any such notice to petitioner.

The Court of Appeals for the Ninth Circuit has denied motions of considerably less importance than a motion to dismiss on the ground that the motions dd not comply with Rule 17.

Kennedy v. U. S., 115 Fed. (2d) 624 (CCA 9).

In the last cited case the Court held that *failure to state points and authorities* required a denial of a motion to correct a record.

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4. THE CASES IN WHICH RELIEF HAS BEEN DENIED ARE CLEARLY DISTINGUISHABLE.

In a situation such as this, where the motion of appellant for relief from his default is a matter within the discretion of the Appellate Court, it is to be expected that there will be cases in which the Appellate Court will, in the exercise of its discretion, deny the application. However, an examination of those cases will show that they are completely distinguishable from the case at bar in most instances in a num-

ber of factors. We have already pointed out that in none of these cases has this Court directly affirmed the action of the Court of Appeals.[1]

Anderson v. Yungkau, 329 U.S. 482, 67 S. Ct. 428, 91 L. Ed. 436, is not an exception to the statement last made for that case did not involve a matter of discretion. It turned solely upon the language of Rule 25(a) which provides that upon the death of a party, the claim is not extinguished but the Court *may* order substitution of the proper party within two years, and that if substitution is not so made, the action *shall* be dismissed. This Court held that the presence of the permissive word "may" and the mandatory word "shall" in the same Rule, made it perfectly clear that a dismissal for failure to make the substitution within two years was mandatory and in effect jurisdictional. The Court further pointed out that Rule 25(a) was based upon a statutory limitation of the power of substitution to a two-year period. (28 U.S.C.A. 788.)

> "That statute like other statutes of limitations was a statute of repose. It was designed to keep short the time within which actions might be revived so that the closing and distribution of estates might not be interminably delayed."

There is no such statute of limitations in this case. As we have pointed out above, and as every Court that

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[1] While it is true that in two of the cases to be considered, *Markham v. Kallinanis*, 151 Fed. (2d) 145 (CCA 9), and *McBee v. U.S.*, 126 Fed. (2d) 238 (CCA 10), this Court denied petitions for writ of certiorari, it is also true that this Court has held that a denial of such a petition does not constitute an affirmance of the Appellate Court's judgment. *U.S. v. Carver*, 260 U.S. 482, 490, 43 S. Ct. 181, 182, 67 L. Ed. 360, 361.

has had occasion to pass upon the subject has stated, the provisions of Rule 73(g) with respect to the filing of the transcript of record on appeal are not jurisdictional. Jurisdiction attaches once the notice of appeal has been filed in time and failure to take subsequent steps necessary to prosecute the appeal does not deprive the Appellate Court of jurisdiction. *Anderson v. Yungkau* clearly presents an entirely different situation.

Furthermore, in the last cited case, this Court pointed out that reasons of policy supported its construction of the Rules since there might be an unfavorable impact upon the distribution of estates in the State Courts if actions could be revived by permitting substitution after the two-year statute of limitations.

Even in the face of these compelling reasons, two of the justices of this Court felt constrained to dissent from the majority opinion and predicated their views upon the harsh result which followed from the majority's opinion. With reference to the committee which drafted the Rules, Mr. Justice Rutledge said:

> "It was conscious also of the many difficulties and injustices which had arisen by virtue of rigid time limitations, whether laid down by statute, rule of court, or judicial decision. The deliberately chosen policy was to do away with those rigidities and to substitute sound discretionary remedies, except as otherwise expressly directed. This policy was stated clearly, fully, and I think accurately in the Rules themselves by the addition of Rule 6 of which Subdivision B is expressly applicable here."

Except for the two exceptions in Rule 6(b) (neither of which is applicable to the instant case), Mr. Justice Rutledge said that the Courts should exercise discretion, and he pointed out that in his view *Anderson v. Yungkau* was "an illustration of the kinds of injuries the committee sought to avoid."

We take it that the majority of the Court did not necessarily disagree with the views expressed by Mr. Justice Rutledge but felt constrained to reach the decision they did because of the mandatory language of Rule 25(a). Consequently, in the absence of such mandatory language in the Rule here involved, and in the face of clearly expressed judicial decision to the effect that the time limitation on the filing of the transcript of record on appeal is not jurisdictional, we submit that the Court of Appeals should have exercised its discretion to avoid the difficulty and injustice which here arises by virtue of a rigid application of the Rule.

Markham v. Kallinanis, 151 Fed. (2d) 145 (C.C.A. 9), cert. den. 327 U.S. 788, 66 S. Ct. 806, 90 L. Ed. 1014, wherein the Circuit Court of Appeals for the Ninth Circuit dismissed an appeal, the chronology presented by the record was as follows:

12/8/44	Notice of Appeal filed, in time.
3/7/45	Extensions of time within which to file the record were granted by the District Court to this date (e. g., the full 90 day period permitted by Rule 73[g]).
4/6/45	Extension granted by the Appellate Court to this date.

5/7/45 Extension granted by the Appellate Court to this date.

5/7/45 Appeal docketed (e. g., 150 days after the notice of appeal was filed).

7/13/45 Notice of motion to dismiss the appeal for lack of prosecution filed.

7/18/45 Motion to dismiss with supporting affidavits filed.

The supporting affidavits alleged that as late as June 21, 1945, there had been no authority given the appellant (Alien Property Custodian) to print the record and that more than sixty days had elapsed since the record had been docketed in the Appellate Court (e. g., more than 210 days after the notice af appeal was filed). Rule 19 of the Rules of the Court for the Ninth Circuit provides that unless the printing fees are paid within ten days of appellant's receipt of notice from the Clerk to pay the same, the Court will dismiss the appeal.

The counter-showing made by the appellant to excuse these long delays (which incidentally run into many months more than the delay here involved) was that there was then pending before this Court a petition for writ of certiorari in another case which appellant urged involved a similar set of facts.

The Circuit Court, however, said that the facts and issues in the other case were not the same as those in the case then before it and secondly, even if they were, that contention could not be considered with favor since practically all cases that reach the Circuit Court

involve real issues of law and there can always be some speculation as to what the Supreme Court might do.

> "If the litigation of this Court could be held up to await the outcome of a writ of certiorari in another case then before the Supreme Court, one of the purposes for enacting the Rules of Civil Procedure would be circumvented."

More important for the case at bar than these considerations, however, is the following language from the Circuit Court's opinion which we submit was the real basis for its decision:

> "*The record here shows a long line of extensions and laches, all invoked with the apparent purpose of delaying the trial of the issues here. Because of appellant's dilatory prosecution of this appeal, we are constrained to grant appellee's motion* * * *" (Emphasis supplied.)

By no stretch of the imagination can the facts presented by the record in the instant case be compared with the facts in *Markham v. Kallinanis.*

Furthermore, it is noted that in *Markham v. Kallinanis* the question arose on a motion to dismiss the appeal presented by appellees after appellants had been in default in printing the record for over two months. In the case at bar, the question was presented by appellant's *prompt* motion for an extension of time within which to docket the record on appeal and the record shows that appellant has, ever since the oversight was called to his attention, been prompt and diligent in seeking to correct the same.

McBee v. U. S., 126 Fed. (2d) 238 (CCA 10), cert. den. 217 U.S. 691, 63 S. Ct. 268, 87 L. Ed. 554, was a case in which the question was raised by appellee's motion to dismiss the appeal for appellant's failure to comply with Rule 75(a) which requires appellant to file and serve a designation of the portions of the record upon which he intends to rely. Since the purpose of Rule 75(a) was to apprise the appellee of the portions of the record upon which appellant intends to rely so that appellee might, if he was so minded, designate other portions of the record, a failure to comply with Rule 75(a) could very well result in prejudice to the appellee, and other Courts have so held.

In re Plankinton Building Co., 133 F. (2d) 900 (CCA 7);

U. S. v. Gallagher, 151 F. (2d) 556 (CCA 9);

Lopatas v. Handler, 121 F. (2d) 928 (CCA 10), *infra.*

In the case at bar, of course, appellant promptly designated the entire record and consequently no such problem is presented. For that reason alone, the *McBee* case is clearly distinguishable.

The Court of Appeals in the *McBee* case, in granting the motion to dismiss, said:

> "Appellant wholly failed to comply with this rule, neither promptly nor at any time did he serve appellee with a designation. The only record that has been filed in this court consists of pleadings, the findings of fact and conclusions of law, the judgment, motion and order overruling motion

> for a new trial, order permitting appeal without cost, notice of appeal, and order enlarging time for lodging appeal. The only reference to any evidence is contained in the statements in appellant's brief recounting his version thereof. *There is therefore nothing before this court for consideration*, and the appeal must be dismissed."

We have already pointed out that in *Maghan v. Young*, 154 Fed. (2d) 13 (App. D.C.), the appellee initiated the action by his motion to dismiss and the Court made it clear that under those circumstances it would dismiss.

> "* * * We have * * * invariably declined to extend relief, except for convincing reasons, where, as is the case here, *appellee after appellant's default has himself filed a preliminary record and moved to dismiss.*" (Emphasis supplied.)

This case, which is the only one relied upon by the Court of Appeals for the Ninth Circuit in the case at bar, is distinguishable not only for the reason that there *appellee docketed the record and moved to dismiss*, whereas here appellant acted promptly to save its appeal, but because in the case at bar, "convincing reasons" were present, while in *Maghan v. Young* apparently no such reasons were submitted to the Court. No application for review by this Court was made in *Maghan v. Young* nor in any of the other cases we will now consider.

In *Richardson v. Metropolitan Life Ins. Co.*, 109 Fed. (2d) 339 (C.C.A. 5), the *appellee moved to dis-*

miss the appeal and the Court stated that it was of the opinion that *there was no such merit in the appeal* to justify a waiver of the rule. Here, too, the distinctions between the case at bar and the cited case are apparent: (1) A motion to dismiss was made by the appellee and (2) before dismissing, the Court considered the question of whether the appeal presented any meritorious question. Both of these factors are absent in the instant case.

Morrow v. Wood, 126 Fed. (2d) 1021 (C.C.A. 5), presented a situation where *the notice of appeal was filed more than three months after the judgment.* Consequently *the Court was without jurisdiction to entertain the appeal* and it of necessity had to dismiss it. The Court's reference to a failure to comply with Rule 73(g) is pure dicta because there was no jurisdiction to entertain the appeal in the first instance.

Drybrough v. Ware, 111 Fed. (2d) 548 (C.C.A. 6), does not involve a question of time and while the Court did dismiss the appeal, it did so *only after it had considered the merits of the case and found there was no prejudicial error in the trial Court record.* By way of dicta concerning the content of the record on appeal, the Court stated that the rules imposed a duty upon the appellant to see that a full and complete record was presented to the Appellate Court and that for his failure to do so, the Court might dismiss the appeal. The Court said of its power to dismiss the appeal for this reason:

> "This power, however, should not be exercised generally unless the omission arose from the neg-

> ligence or indifference of appellant and, *where good faith is shown*, appellee will be directed to designate such additional papers, documents and proof used in the hearing below as he deems necessary for the proper preparation of the case and appellant will be required to file the same as a part of the record under penalty of a dismissal of the appeal * * *, or the Court, *in order to avoid injustice*, may, on proper suggestion or on its own motion, direct that the omission be corrected by a supplemental transcript or remand the cause for a finding on controverted fact questions * * * We are of the opinion that the record here shows such an indifference to the Rules on the part of appellant as to require a dismissal of the appeal." (Emphasis supplied.)

Despite such indifference on the part of the appellant the Court did review the case on the merits and stated that it was doing so because

> "We are reluctant to base our decision on a defective record and, before arriving at this conclusion, have carefully studied it in order to avoid an injustice, but viewing the factual matters presented to us in the light most favorable to appellant, we are unable to apply the legal concept of apportionment on which he relies."

In other words, despite appellant's indifference which the Court stated justified a dismissal of the appeal, it nevertheless reviewed the entire record on the merits to avoid an injustice and only after it was satisfied that there was no merit in the appeal did it dismiss.

In *First National Bank Etc. v. Detwiler,* 131 Fed. (2d) 184 (C.C.A. 6), the Court dismissed the appeal because there was no explanation for the delay *and because in the Court below the appellant had unnecessarily and inexcusably delayed proceedings to the disadvantage of the adverse party.* There is no such suggestion in the instant case.

In *Mulvaney v. Lever Bros.,* 158 Fed. (2d) 956 (C.C.A. 6), the record showed the following:

5/31/46 Judgment entered in favor of defendant.

8/29/46 Notice of Appeal filed by plaintiff (Note: This was practically the last day on which the Notice of Appeal could have been filed.)

10/5/46 Order entered enlarging time for docketing appeal to 90 days from the date of filing Notice of Appeal.

12/5/46 No further action having been taken by appellant, appellee filed a motion to docket and to dismiss.

12/11/46 Appellant filed a memorandum opposing appellee's motion and filed a motion of his own requesting sixty days additional time within which to docket the appeal.

12/12/46 Appellee filed a memorandum in opposition to appellant's motion.

The Court granted the motion to dismiss because the appellant had failed "to present any showing whatever" of excusable neglect. The recital of facts in this case makes it perfectly apparent that it is distinguishable from the case at bar on at least two

grounds: The long series of extensions sought by appellant indicate dilatoriness, and its failure to proceed to perfect the appeal until after appellee filed a motion to docket and dismiss.

U. S. v. Schlotfeldt, 123 Fed. (2d) 109 (C.C.A. 7), was a *habeas corpus* proceeding opposed by the District Director of Immigration. The trial Court granted a writ releasing the alien from custody on September 21, 1940. The notice of appeal was filed on December 20, 1940, just one day short of the statutory time. Since the appeal had not been docketed by March 4, 1941 (over two months past the forty days provided for in Rule 73[g]), the appellee moved to docket and dismiss. The Court recognized that it had discretion to allow the appeal to be docketed but in view of the absence of any showing to excuse the delay and in view of the long delay, it dismissed the appeal.

In re Gamill, 129 Fed. (2d) 501 (C.C.A. 7) was a motion by appellant for leave to docket an appeal. The order of the District Court had been entered on January 6, 1942, and the notice of appeal was filed on February 2, 1942, just one day before the period provided for in the rules. No application for extensions of time within which to file the record was made to the District Court and after the expiration of the forty day period, the motion to extend was directed to the Circuit Court. Appellant assigned as his reasons for delay the fact that negotiations for settlement were in progress (this factual allegation was

denied by the appellees), and illness of one of appellant's counsel. However, the Court pointed out that there were three counsel involved and that the one who was ill had been ill for some two years prior to these proceedings and was apparently not an active participant in the handling of the litigation. The Court said:

> "While the Rules of Civil Procedure provide that, with the exception of the requirement of timely notice of appeal, none of the steps to secure review of a judgment appealed from are jurisdictional (Rule 73[a]), it is clear that the Rules are expected to be followed, and that unless reasons satisfactory to the Court are advanced as a basis for special relief from their provisions, it will take such actions as it deems appropriate. In this case, such action would be denial of leave to docket the appeal, for leave is required by Rule 11(2) of this Court: 'And in no case shall the appellant be entitled to docket the appeal after the time allowed by this Rule unless by special leave of this Court.'[2] We do not find the reasons set forth by appellant sufficiently persuasive to justify relaxation of Rule 73(g) or our Rule 11(2)."

In re Plankinton Building Co., 133 Fed. (2d) 900 (C.C.A. 7), presented this factual situation:

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[2]The Seventh Circuit, as well as the Second Circuit (see *Pyramid Motor Freight Corp. v. Ispass,* 330 U.S. 695, 67 S.Ct. 954, 91 L.Ed. 1184) had a rule which did not allow the docketing of the appeal after the time had run except by leave of court. An examination of the rules of the Ninth Circuit show that there is no such special rule and there appears in this record no explanation for the failure of the clerk to docket the appeal when it was tendered to him.

10/28/42 Notice of Appeal filed.

12/ 4/42 Appellant filed Designation of Record.

12/ 8/42 Appellant served a copy thereof on appellee.

Appellant did nothing further to docket the record. Thereupon, on January 11, 1943, the appellee filed a "short record" under Rule 75(j) and moved to dismiss the appeal on the grounds that the designation had not been filed promptly as required by Rule 75(a) and that the record was not filed within the time allowed by Rule 73(g). This motion was granted.

The Court recognized that the requirements of Rule 73(g) were not jurisdictional, but nonetheless stated:

> "In this case the designation of the record did not include the complete record and appellants did not serve notice upon the appellee or other defendants as to what they had included in their designation of the record until December 8, forty-one days after the filing of the notice of appeal; thus *they deprived the appellee of its rights under Rule 75(a) of having ten days to serve and file a designation of additional portions of the record.* Under the circumstances here appearing, we see no reason for denying appellee's motion." (Emphasis supplied.)

The case at bar is distinguishable from the *Plankinton* case on the grounds that, first, the motion before the Court was a motion of the appellee to dismiss; and secondly, the conduct of the appellant resulted in prejudice to the appellee. Neither of these factors is present in the case at bar.

In *Leimer v. State Mutual Assurance Co.,* 106 Fed. (2d) 793 and 107 Fed. (2d) 1003 (C.C.A. 8), appellee moved to dismiss for failure to designate the record under Rule 75(a) and because no points as required by 75(d) were filed. The Court, in its original decision (106 Fed. [2d] 793) had denied without prejudice a motion to dismiss and had given the appellant an opportunity to complete the record. Despite this fact, the appellant continued in default and consequently when the matter was before it again, the Court really had no alternative but to exercise its discretion by dismissing.

In *Lopatas v. Handler,* 121 Fed. (2d) 938 (C.C.A. 10), the Court's discussion of a motion to dismiss the appeal which was before it is really dicta because the Court reviewed the entire record on the merits and decided the case by ruling on a motion to reverse with directions to the trial Court.

With respect to the motion to dismiss the appeal, the Court noted that the Notice of Appeal was filed on March 21, 1941, and the record was not filed until May 9, 1941, in violation of Rule 73(g). Furthermore, the designation of the record, while it was filed on April 28, 1941, was not served upon the adverse party and since it did not include the complete record, there was a failure to comply with both 75(a) and 75(d). This, of course, as other cases have pointed out, resulted in prejudice to the appellee.

In any case, as we have stated, the Court reviewed the entire record and said: "Furthermore, it is our opinion that the record discloses no prejudicial error."

The next two cases to be considered arose in the Ninth Circuit. In both of them, although the appeal was dismissed, the circumstances were considerably different from the case at bar.

In *Goldenhar v. White,* 127 Fed. (2d) 861 (C.C.A. 9), the entire opinion is as follows:

> "*Per curiam:* This cause coming before the Court on default of appellant in failing to make deposit covering estimated expense of printing of record as required by Rule 19 of the Rules of this Court, and it appearing from the files that appellant's counsel have been notified that such default would be called to the Court's attention on this date, and no response to such notice having been received, ordered appeal herein dismissed for failure of appellant to make deposit as required by Rule 19 of the Rules of this Court, that a judgment be filed and entered accordingly, and that mandate of this Court issue forthwith."

It is perfectly clear from the foregoing that appellant's counsel had an opportunity to correct the default before the Court took the drastic step of dismissing the appeal. No such opportunity has been ever afforded in this case.

In *U. S. v. Gallagher,* 151 Fed. (2) 556 (C.C.A. 9), the appeal was dismissed, but there was a failure to comply not only with Rule 73(g) but also with Rule 75(a) and 75(d). These rules, having to do with the designation of the record on appeal, a failure to comply with them could result in serious prejudice to the appellee. In the case at bar there was no

failure to comply with those rules and there is no question but what the short delay that occurred did not prejudice the appellee.

VI.

CONCLUSION.

The foregoing argument makes clear, we submit, the following:

1. There was no jurisdictional defect. The notice of appeal having been filed in time, the Court of Appeals had jurisdiction to entertain the appeal and was not compelled by reason of any statute, judicial decision, or Rule to dismiss it.

2. There was no proper motion to dismiss the appeal before the Court of Appeals. Its order granting such a purported motion was therefore void.

3. The exercise of a sound discretion required the Court of Appeals to grant petitioner's motion for an extension of time within which to docket the record on appeal. The failure to docket the record within the time allowed in the first instance was due to an inadvertence which is clearly explicable in view of the facts and circumstances submitted to the Court of Appeals. Immediately the oversight was called to petitioner's attention, prompt and expeditious steps were taken to correct it. No possible prejudice could have resulted to respondents, and no substantial interference with the processes of the Court have

followed. The appeal presents a substantial question which ought to be determined by the Court of Appeals on the merits.

It is admittedly unfortunate that the oversight or inadvertence occurred. There is no question but that it would have been more satisfactory for the appeal to have been filed within the ninety-day period allowed by the District Court or for the petitioner to have obtained a further extension of time from the Court of Appeals, which it could have done under Rule 13. Admitting this, however, we submit that it is doubly unfortunate that the Court of Appeals should have taken the harsh view that it did of the situation, refused to consider the appeal on its merits, and compelled petitioner to apply to this Court for relief from its action.

Dated, San Francisco, California,
February 9, 1949.

Respectfully submitted,
HERBERT RESNER,
Counsel for Petitioner.

GLADSTEIN, ANDERSEN, RESNER & SAWYER,
Of Counsel.

FILE COPY

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1948

No. 564

TUCKER PRODUCTS CORPORATION,
Petitioner,

vs.

GEORGE S. HELMS, HAROLD T. THRASH, GEORGE S. HELMS and HAROLD T. THRASH, as co-partners, doing business under the firm name and style of George S. Helms and Harold T. Thrash,
Respondents.

REPLY TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

JAMES W. HARVEY,
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Counsel for Respondents.

J. EMMET CHAPMAN,
FREDERICK C. DEWAR,
Hearst (Examiner) Building, San Francisco 3, California,
Of Counsel.

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REPLY TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your Respondents, George S. Helms and Harold T. Thrash respectfully allege:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The summary statement of petitioner is, for the purposes involved in the instant petition, acceptable as a statement of fact, save and except that on page 2 of its petition petitioner states: "The complaint alleges that petitioner established credit at the Bank of California and sets forth *in haec verba* the document which established said credit" (Tr. 5).

This is not a correct statement of fact, for the document petitioner adduced in evidence in support of Paragraph V of petitioner's complaint (Tr. 5) was a letter from the Bank of California at San Francisco, addressed to Meyers Sales Co., Mr. Harold T. Thrash, Mr. George S. Helms, 112 Market street, San Francisco, California, which commenced with the following sentence, to-wit: *"This letter is solely an advice and conveys no obligation or engagement on our part."* The rest of the letter is as quoted on page 5 of the transcript of record and signed "Very truly yours, C. E. Meyer, Assistant Manager, Foreign Department;" as amended herein, it is correct.

It is correct that respondents filed a supplemental answer and special defense in which respondents asserted that petitioner represented as an inducement to the so-called agreement, that petitioner would deposit in the Bank of Covelo at Covelo, California, an irrevocable letter of credit in the sum of $80,000.00, and that petitioner failed—and the trial Court found that it had failed—to establish said letter of credit whereby respondents were prevented from performing their part of the contract (Tr. 19-20). These last

mentioned facts were established by independent and irrefutable evidence upon trial.

QUESTIONS PRESENTED AND REASONS RELIED UPON FOR DENIAL OF THE WRIT OF CERTIORARI.

The Court of Appeals for the Ninth Circuit did not abuse its sound discretion in denying petitioner's petition for an extension of time and in dismissing the appeal.

ARGUMENT.

IT IS NOT AN ABUSE OF DISCRETION FOR THE COURT OF APPEALS TO DENY PETITIONER'S MOTION FOR EXTENSION OF TIME AND TO DISMISS THE ACTION.

Counsel for the respondents submit that there is in fact one simple question before the honorable Court on the matter of this petition for writ of certiorari, namely, did the Court of Appeals of the Ninth Circuit abuse its discretion in denying appellant and petitioner's motion for an extension of time.

Petitioner admittedly did nothing whatsoever to perfect its appeal after filing its notice of appeal and designation of record. The Clerk of the District Court secured such orders extending time as were within the provisions of the District Court, within the extreme time limit permitted by Rule 73 (g) of the Federal Rules of Civil Procedure, that is, 90 days. Petitioner did not inquire as to its case or even pay the necessary fees in order to file and docket its ap-

peal in the Court of Appeals (Tr. 29-30, p. 4, of petitioner's brief). Petitioner attempts to excuse itself upon the ground of the excusable neglect of Norman Leonard, Esq., because he was preoccupied and engaged in other matters. Norman Leonard, Esq., states in his affidavit accompanying petitioner's motion for extension of time, that he received a telephone call from the Clerk of the District Court on November 26, 1948, (Tr. 30)—106 days after notice of appeal had been filed—advising him that petitioner had not paid the necessary fees in order to file and docket the record (Tr. 30). He admittedly took no interest in attempting to perfect the appeal until after this telephone call.

Harold M. Sawyer, Esq., appeared in Court for petitioner upon motions prior to trial, including setting the cause for trial. Norman Leonard, Esq., signed the complaint for his firm, but did not conduct the trial of this case for petitioner. Petitioner was represented upon trial by George R. Andersen, Esq., a member of the firm of Gladstein, Andersen, Resner and Sawyer; notice of appeal was signed "Gladstein, Andersen, Resner and Sawyer, by George R. Andersen, Norman Leonard, Attorneys for Plaintiff" (Tr. 22); the affidavit in support of notice of motion for extension of time in the Court of Appeals was sworn to by Norman Leonard, Esq. (Tr. 30); likewise the petition for a rehearing in the Court of Appeals and the supporting affidavits are sworn to by Norman Leonard, Esq. (Tr. 39, 40, 41, 43, 52). There is either no mention of, or affidavits by, Richard Gladstein, Esq., George R. An-

dersen, Esq., Herbert Resner, Esq., or Harold M. Sawyer, Esq., in explanation of what these gentlemen and their staff were doing in the critical period involved in the attempted perfecting of the appeal by Norman Leonard, Esq., whose notice of appeal is signed "Gladstein, Andersen, Resner and Sawyer, by George R. Andersen and Norman Leonard, attorneys for plaintiff (Tr. 22). Norman Leonard, Esq., in support of his motion for extension of time, states: "He is * * * one of the attorneys charged with the handling of the above entitled case." (Tr. 29.)

Norman Leonard, Esq., in his argument before the Court of Appeals upon the motion for extension of time, admitted that the only thing required to be done was to pay the necessary Clerk's fees; admitted there was no voluminous transcript which required any extensions of time upon the part of the Reporter and Clerk of the District Court in order to prepare it; admitted that the transcript of the trial testimony had been written up before judgment for the purpose of filing briefs in the trial Court. At the time of the hearing of the motion, when questioned by the Court of Appeals, he failed to satisfactorily answer the Court of Appeals as to what particular *litigation* caused *him* to be "preoccupied."

Petitioner's counsel, in his brief, extolls his virtue and the speed with which he filed notice of appeal and with which he filed designation of record, and thereby protests that he was diligent and not guilty of laches. He presents his speed in starting, and protests his lack of dilatoriness, even as the hare raced

with the tortoise. Petitioner states in his brief in support of his petition for a writ of certiorari: "No clerk has ever questioned the credit of counsel in such matter." (p. 16 of brief.) It is noted that the plaintiff and petitioner, upon trial of the action, failed to prove it had established credit (Tr. 19-20), and evidently had failed to establish credit with the Clerks of the Court. We submit that the Clerk of the District Court has no duty to act without proper payment of the Court fees. It is counsel's duty to follow his case and see that proper steps are taken by him. *Drybrough v. Ware*, 111 Fed. (2d) 548 (CCA 6.)

In *Maghan v. Young*, 154 Fed. (2d) 13 (App. D. C.), where the appellants were denied an extension of time and the action was dismissed, counsel for appellant opposed the motion to dismiss for excusable neglect; his explanation was, that counsel was professionally engaged in attention to other matters. The Court stated:

> "We think this is not an adequate reason to justify our exercise of discretion."

The Court in that case, citing *Burke v. Canfield*, 111 Fed. (2d) 526 (App. D. C.), said:

> "In *Burke v. Canfield* we did grant relief in a somewhat similar case, on the ground that the rules were new and that it was unlikely counsel had sufficiently acquainted themselves with their terms; but we were careful on that occasion to advise the Bar that we intended thereafter to exercise sparingly our discretion to save an appeal prosecuted in disregard of the rules. * * * The

> reasons advanced in the present case show neglect but failed to show excusable neglect."

In the case of *Tucker Products Corporation v. George S. Helms, et al.*, 171 Fed. (2d) 126 (CCA 9), the Court stated:

> "We do not regard such preoccupation in that litigation as a reasonable ground for neglect of the duties of officers of this court. ***Maghan v. Young,*** 154 Fed. (2d) 13 (App. D.C.)"

Petitioner's counsel (p. 16 of petitioner's brief) admit they have had much experience in appeals to the Court of Appeals, and to this honorable Court. They should know the rules by now.

Counsel for the petitioner endeavors to point out that Rule 17, sub-division 3 of the Court of Appeals of the Ninth Circuit requires a written motion to dismiss. We quote the following from the rule:

> "No motion to dismiss, *except on special assignment by the Court,* (emphasis ours) shall be heard unless previous notice has been given to the adverse party."

At the time of the hearing of petitioner's motion for extension of time, when respondents appeared in opposition thereto, and orally moved to dismiss the appeal (Tr. 31-32), petitioner made no objection to the appearance, opposition, and motion. It is further submitted, even where no motion to dismiss is lodged in a matter of this character, that under Rule 73 (a) of the Federal Rules of Civil Procedure, the Court

of Appeals may dismiss the appeal upon its own motion.

The respondents have perused the cases cited by petitioner and find that of those cited which concern relief for excusable neglect, with the exception of the cases cited in respondents' brief, there is either no reason assigned for granting relief, or the reasons advanced lacked persuasiveness or failed to show excusable neglect if denied; or, if granted, the litigant either had been diligent or the reason for the motion was because of confusion, and in the Court's opinion there was excusable neglect. It is further submitted that in matters discretionary with the Court, as in this case, each must stand upon its own facts as presented to the Court; that the facts submitted by the petitioner herein were not sufficient to justify relief by the Court of Appeals for excusable neglect.

In the case of *In Re Gamill,* 129 Fed. (2d) 501 (CCA 7), the Court stated that the record shows that appellant had been represented by three counsel, and no reason is shown why, if one were ill (or engaged in other matters) the others could not carry out the necessary steps in the case. The instant case seems to the respondents to be on all fours with *In re Gamill,* with the additional fact that there are at least five counsel in the firm representing the petitioner herein, and only one of them, by his affidavit, claims to have been "preoccupied" in other matters. In this case petitioner does not attempt to explain why even one of the co-counsel could not have watched the calendar

and perfected this appeal. It is to be noted that at least four of the five counsel have, at some time, personally appeared before the Court in this case. The Court in *In re Plankinton Building Co.*, 133 Fed. (2d) 900 (CCA 7) stated:

> "True it is, the mandatory requirements of Rule 73 (g) is alleviated in its rigidity by subsection (2) of the same rule which renders the failure to comply with subsection (g) non-jurisdictional * * * Nevertheless it is clear that the rules are expected to be followed, and unless reasons satisfactory to the Court are advanced as a basis for special relief from their provisions, the Court will take such action as it deems appropriate."

Respondents submit petitioner has shown no abuse of discretion upon the part of the Court of Appeals, but has in fact shown entire indifference upon the part of petitioner as to the rules upon appeal, and that such indifference is not excusable.

Dated, San Francisco, California,
March 2, 1949.

Respectfully submitted,
JAMES W. HARVEY,
Counsel for Respondents.

J. EMMET CHAPMAN,
FREDERICK C. DEWAR,
Of Counsel.